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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Macon Apparel Corporation

**File:** B-272162

**Date:** September 4, 1996

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Ruth E. Ganister, Esq., and Glenn L. Blackwell, Esq., Rosenthal & Ganister, for the protester.

John M. Logue, Esq., and Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Agency evaluation of protester's past performance as "marginally acceptable" is unobjectionable where agency considered protester's improvements in deliveries and contractual adjustments to delivery schedules, but found protester's deliveries under five of six most recent contracts were inexcusably delinquent.

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## **DECISION**

Macon Apparel Corporation protests the award of a contract to Martin Manufacturing Company under request for proposals (RFP) No. SPO100-95-R-0095, issued by the Defense Personnel Support Center, Defense Logistics Agency for the manufacture of certain shirts. The protester contends that the agency's evaluation of Macon's past performance was flawed.

The RFP sought proposals to manufacture long-sleeve shirts for wear by Navy personnel. The RFP contemplated a basic award for the manufacture of 123,360 shirts, with two mandatory options of 123,360 shirts each. Offerors were required to submit a product demonstration model (PDM) using the materials specified in the RFP. Offerors also were required to describe their experience with production of the same or similar garments within the last 2 years, including delivery and quality performance information and explanations of any substandard quality or delinquent delivery.

Proposals were evaluated on price and four technical factors, listed in descending order of importance: PDMs; experience/past performance; manufacturing plan; and quality assurance plan. Technical quality was more important than price. Proposals

were rated on an adjectival basis with categories of highly acceptable, acceptable, marginally acceptable, and unacceptable. Award was to be made to the offeror whose proposal was evaluated as most advantageous to the government.

Three offerors including Macon and Martin submitted proposals by the May 4, 1996, closing date. In its initial evaluation, the agency rated all three proposals marginally acceptable under the experience/past performance factor and thus, marginally acceptable overall. In October 1995, the agency conducted discussions with all three. Among other things, the agency identified five of Macon's six recent contracts which were delinquent and invited Macon to describe the reasons for the delinquency and future actions to be taken to preclude further delinquencies. The agency invited Martin and the other offeror to explain negative aspects of some, but not all, of their delinquent contracts. In reviewing the offerors' responses, the agency found that the delivery delays for all offerors were inexcusable and determined not to change the marginally acceptable rating for any of the offerors.

After conducting more rounds of negotiations, the agency requested best and final offers (BAFO) from all three. At that point, all three proposals were rated marginally acceptable overall due to marginally acceptable experience/past performance ratings. In April 1996, during its final review, the agency discovered that Martin and the third offeror had not been provided an opportunity to address instances of negative past performance on certain contracts.<sup>1</sup> Since these offerors' marginal ratings were based on these unresolved negative aspects, the agency reopened negotiations with all offerors. The agency identified the contracts in question for Martin and the third offeror and provided Macon the opportunity to furnish any additional or revised information.

As a result of Martin's responses, the agency evaluated Martin's proposal as acceptable in all factors including experience/past performance. The agency did not change the marginally acceptable ratings for Macon and the third offer. While the contracting officer considered Macon's competitive prices and the firm's recent improvements in performance, he determined that Martin's proposal, specifically in the area of past performance, was clearly technically superior to the others and warranted paying a premium of \$409,548.08 (16 percent) over Macon's price. The source selection authority approved the contracting officer's determination to award the contract to Martin.

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<sup>1</sup>The agency also failed to specify one of Macon's delinquent past contracts in its discussions with Macon. However, the record is clear that the agency specifically did not consider that delinquent performance in its evaluation. Rather, Macon's marginally acceptable past performance rating was based on five more recent delinquent contracts. Thus, Macon was not affected by the agency's action in this regard.

Macon contends that the agency unreasonably evaluated its past performance as marginally acceptable. Macon argues that its proposal should have been rated as acceptable since it has successfully been performing under other government and commercial contracts and has a significant history of successful production of this and other military shirts. Macon maintains that its delays were not the result of its fault or negligence.

Where an evaluation is challenged, we will examine the evaluation to ensure that it was reasonable and consistent with the evaluation criteria and applicable statutes and regulations, since the relative merit of competing proposals is primarily a matter of administrative discretion. Information Sys. & Networks Corp., 69 Comp. Gen. 284 (1990), 90-1 CPD ¶ 203. Mere disagreement with the agency's evaluation does not itself render the evaluation unreasonable. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115. Our review of the record here provides no basis to object to the agency's evaluation.

In evaluating Macon's past performance as marginally acceptable, the agency considered that the protester's delinquencies occurred on critical contracts causing the agency to restructure the firm's contracts to minimize supply failures.<sup>2</sup> While noting Macon's recent "marked improvement," the agency concluded that it was not sufficient to overcome the firm's poor showing on a number of contracts, nor did it convince the agency that the firm was truly capable of performing according to contract requirements. Macon's disagreement with this assessment by the agency provides no basis for finding that assessment unreasonable. Litton Sys., Inc., *supra*.

In explaining its delinquent deliveries, Macon simply stated that it had planned to build production through the award of one of the five recent contracts and had anticipated increasing production by increasing efficiency and hiring additional workers. Macon was unsuccessful on both fronts and the only solutions to future problems it offered were delivery date extensions and plans not to accept additional work beyond a certain level of production. None of these explanations indicates any fault by the government or reflects circumstances beyond Macon's control. In essence, Macon's explanation concedes that it had misjudged its ability to handle the workload of its multiple contracts.

Macon argues that the agency improperly relied on the state of Macon's performance as of October 1995. According to Macon, its performance record had significantly improved by April 1996, when the agency provided Martin an additional

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<sup>2</sup>Macon also contends that it was unfair for the agency to have considered delivery delays where it had negotiated extended delivery dates. However, since these extensions did not excuse all of Macon's delay on its contracts, we find nothing objectionable in the agency's evaluation.

opportunity to explain its past performance deficiencies. Macon contends that the agency should have given it the same opportunity as Martin and should have considered Macon's improvements of which the agency was already aware. In this regard, Macon observes that it was ahead of schedule against the revised schedule on two contracts and contends that the agency failed to consider all of its excusable delay. Macon also contends that the agency failed to consider its improved production volume which increased from less than 42,000 units per month in October to more than 53,000 per month in April.<sup>3</sup> Macon's arguments are without merit.

First, Macon was provided the opportunity in April to provide any additional or revised information, as well as to revise its price. Macon declined to do either. While the agency did not advise Macon that it still considered the protester's past performance to be marginally acceptable, nothing prevented Macon from pointing out its performance improvements. In this regard, while it now relies on delays attributable to the July 1994 flooding, it did not mention this to the agency in October 1995 or in April 1996.

Second, it is clear from the record that the agency did consider Macon's performance from October to April and acknowledged its improvements; the agency simply did not agree that the improvements were sufficient to warrant an acceptable rating for this evaluation factor. For example, one of the five contracts was originally evaluated as 2 months behind schedule. By April, the contract was evaluated as completed only 52 days late. The agency also found that Macon was ahead of schedule on the other four contracts. However, the agency noted that

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<sup>3</sup>Macon also contends that the agency should have considered more excusable delay based on flooding at its Macon, Georgia plant in July 1995. According to Macon, the credit it did receive was inadequate. We note that Macon received excusable credit on two contracts as a result of the flooding and contractually waived any claim to additional credit. With regard to the remaining contracts on which Macon was behind schedule, we also note that (as Macon subsequently conceded in its supplemental comments) the flooding was in July 1994, not 1995, months before the remaining contracts were awarded. We fail to see how the flooding could have resulted in unexpected or unavoidable delays on these contracts.

Macon was ahead of schedule based on revised schedules and that each contract still had 1 to 2 months of inexcusable delay.<sup>4</sup> The agency also considered Macon's improved productivity, but found it inconsistent. For example, while in April, Macon was shipping 52,000 units on a requirement for 49,000 units, in October, Macon was shipping only 25,000 units when 47,000 units were required. From this, the agency reasonably concluded that Macon had not shown a consistent ability to meet required delivery schedules. While Macon's delivery projections showed that it would complete all its contracts on time or ahead of the revised schedules, the agency also found it unlikely that Macon could meet all of its April projections which included shipment of 59,000 units on two of its contracts.<sup>5</sup> In sum, the agency reasonably concluded that Macon's recent improved performance did not warrant upgrading Macon's performance evaluation of marginally acceptable.

Macon next contends that the agency improperly viewed Martin's past performance as acceptable despite a lengthy delay on one contract and quality deficiencies on others. Macon argues that its delays were shorter and that it had no quality deficiencies.

The differing evaluations are based on the agency's finding that Martin's explanations of its deficiencies were more compelling than Macon's. While Macon explained its delinquencies as essentially due to misjudgment of its production capacity, Martin detailed the reasons for its 7-month delay and its efforts to cure the problems responsible for the delay. In this regard, Martin explained that the delay was due to changes in the 13-year-old shade specification. While Martin had used the original fabric manufacturer as its subcontractor to ensure it met the specification, the subcontractor was initially unsuccessful. Martin sought the

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<sup>4</sup>The agency has acknowledged that the evaluation of one contract showed 4 months' delinquency when in fact it was a 3-month delinquency and that final delivery was projected to be only 1 month inexcusably late. The agency explains that the reference to 4 months was a typographical error and states that it considered the actual delinquency to be a negative aspect which, in conjunction with the other late contracts, supported the rating of marginally acceptable past performance.

<sup>5</sup>The agency also considered explanations of Macon's delinquencies which it submitted to other contracting officers. In one of Macon's explanatory letters, after discussing the effects of the flood and how its production had recently increased greatly, Macon stated: "We do however take some responsibility of overloading the plant beyond its capacity." The agency reasonably viewed this as a concession by Macon that it bore some responsibility for its delinquent performance.

reasons for the problems and found them due to changes in the dye formulation including deletion of a soil release additive which affected the shade. Once the problem was solved, Martin shipped the complete order within 90 days. The agency concluded that any end item manufacturer would have encountered the same problems as Martin for this contract. Thus, while the delay was "inexcusable," the agency determined that the delay should not be held against Martin.

Further, of the 15 Martin contracts reviewed, the agency found only three minor deficiencies in addition to the shade matching delinquency. On one, Martin finished on time though it experienced a delay in the middle of performance and a second contract was only 1 week behind schedule. A third involved a quality problem so minor that it did not warrant repair or replacement; the garments were accepted in exchange for a small price reduction. Comparing these circumstances with those surrounding Macon's past performance, we find nothing inequitable in the agency's conclusion that Martin's past performance was acceptable, while Macon's was marginal.

Macon also notes that the agency is paying some \$400,000 more for Martin's shirts than it would pay for Macon's. In a negotiated procurement, the government is not required to make award to the lowest cost, technically acceptable offeror unless the RFP specifies that cost will be the determinative factor for award. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. Award to offerors with higher technically scored proposals and higher prices are unobjectionable, so long as the result is consistent with the evaluation criteria, and the agency has determined that the technical difference is sufficiently significant to outweigh the cost difference. Kelsey-Seybold Clinic, P.A., B-217246, July 26, 1985, 85-2 CPD ¶ 90. Consistent with that standard, the agency concluded that Martin, with its superior past delivery history, represented the best value despite its higher price. We see nothing unreasonable with that conclusion.

The protest is denied.

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of the United States